STATE OF MICHIGAN

IN THE SUPREME COURT

BETTINA WINKLER, by her next friends HELGA DAHM WINKLER and MARVIN WINKLER,

Plaintiff-Appellant,

v.

MARIST FATHERS OF DETROIT, INC. d/b/a NOTRE DAME PREPARATORY HIGH SCHOOL AND MARIST ACADEMY

Defendant-Appellee.

Supreme Court No. 152889

Court of Appeals No. 323511

Oakland County Circuit Court
Lower Ct. No. 14-141112-CZ

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PLAINTIFF-APPELLANT BETTINA WINKLER'S SUPPLEMENTAL BRIEF IN SUPPORT OF HER APPLICATION FOR LEAVE TO APPEAL

Table of Contents

Table of Authorities

Issues Presented

I. Whether the doctrine of ecclesiastical abstention involves a question of a court's subject matter jurisdiction over a claim.

Plaintiff-Appellant says: *No*

II. Whether the Court of Appeals correctly concluded that consideration of plaintiff's challenge to defendant's admission decision would have impermissibly entangled the trial court "in questions of religious doctrine or ecclesiastical polity".

Plaintiff-Appellant says: *No*

III. Whether this Court should overrule *Dlaikan v. Roodbeen.*

Plaintiff-Appellant says: *No*

Before this court is a question as to the limits of a court's rule in reviewing the decisions of churches and church organizations. While such religious bodies are given broad deference under the law, it is not absolute, and such deference should not apply in the case at bar.

The Ecclesiastical Abstention Doctrine

This doctrine traces its origins 145 years ago to *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). The Supreme Court was faced with a property dispute between pro- and anti-slavery factions of the Presbyterian church. The anti-slavery faction refused to recognize the decision of the church's highest ruling authority, or synod. The Court affirmed the decree which respected the synod's authority, holding: "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." [Id. at 727] The court added, "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." [Id. at 728-729]

This principle has endured, subject to refinement. In *Jones v. Wolf*, 443 U.S. 595 (1979), the court affirmed that "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." [Id. at 602] This may include "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them," *Watson*, Id. at 733-734, or "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." [*Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976)]

The Michigan Supreme Court has recognized this doctrine in a similar fashion. In *Smith v. Calvary Christian Church*, 462 Mich 679, 684 (2000), the Court stated: "Under the ecclesiastical abstention doctrine, apparently derived from both First Amendment religion clauses, "civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity."" [internal cites omitted]

There Are Limits to Ecclesiastical Abstention

Even in *Watson v. Jones*, Id. at 733, the court recognized limits to ecclesiastical abstention. "[I]t may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else.[1] Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up."

To reiterate, the key qualification regarding court intervention in property disputes is where the determination "in no sense depend[s] on ecclesiastical questions." Thus a court may step in where resolution can "be made without extensive inquiry by civil courts into religious law and polity." [*Serbian E. Orthodox Diocese*, Id. at 708-709] In such instances, "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."" [*Jones v. Wolf*, Id. at 602, emphasis in original, internal citations omitted.]

[1] Also see *Reynolds v. United States*, 98 U.S. (8 Otto.) 145 (1878), where a unanimous court held that a law banning polygamy was constitutional, and did not infringe on the free exercise of religion.

Michigan courts also recognize that "civil courts have the general authority to resolve church property disputes" except "on the basis of religious doctrine and practice", where courts must "defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." [*Bennison v Sharp*, 121 Mich App 705, 712-713 (1982)]

Applying these general rules to this case, ecclesiastical abstention should not apply, because Bettina Winkler's dispute with Marist Fathers involves an anti-discrimination statute of high public policy importance, involving no consideration of formal doctrinal decisions.

Ecclesiastical Abstention and Subject Matter Jurisdiction

Having summarized the contours of the ecclesiastical abstention doctrine, Plaintiff-Appellant will address the court's first issue, "whether the doctrine of ecclesiastical abstention involves a question of a court's subject matter jurisdiction over a claim, compare *Lamont Community Church v Lamont Christian Reformed Church,* 285 Mich App 602, 616 (2009), with *Dlaikan v Roodbeen,* 206 Mich App 591, 594 (1994)."

As aptly put by *Watson v. Jones*, "There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, ans *(sic)* which is used so often by men learned in the law without a due regard to precision in its application." [Id. at 733] To this end, ecclesiastical abstention is a principle involving mixed questions of fact and law, and defies neat categorization. *Lamont,* Id. at 616.

In the case of ecclesiastical abstention, while the determination of jurisdiction is a question of law, the court must make factual findings before making the legal determination. Once it does so, even as it may decline to overturn a hierarchical decision, it may still retain jurisdiction to affirm or enforce the decision of the church. As such, the jurisdictional determination is not strictly one of subject matter, which *Lamont,* Id. termed a "misnomer." It is more a principle of deference.

Accordingly, before making their jurisdictional determinations, the courts faced with a defense of ecclesiastical abstention have often had to apply extensive factual analysis. This may include inquiry into the nature of the decision, whether hierarchical or congregational, as well as the nature of the events.

The Hierarchical/Congregational Distinction

While not every court discusses the distinction, the ecclesiastical abstention doctrine only applies where the decision at issue is "hierarchical" in nature. *Lamont,* Id. at 616. As summarized by *Hillenbrand v. Christ Lutheran Church of Birch Run*, 312 Mich App 273, 278-279 (2015), ""The determination of whether a denomination is hierarchical is a factual question." A denomination is hierarchical if it "is but a subordinate part of a general church in which there are superior ecclesiastical tribunals with a more or less complete power of control ... A denomination is organized in a hierarchical structure when it has a central governing body which has regularly acted within its powers while the looser 'congregational' structure generally has all governing powers and property ownership remaining in the individual churches." Stated differently, a church organization is congregational if it is self-governing; a church organization is hierarchical if it is "part of and governed by a larger organization.""[Internal citations omitted]

The factual decision may be based on "the language of the Church Order and other governing documents." *Lamont,* Id. at 617. For example, in *Serbian E. Orthodox Diocese*, the Court extensively discussed the history and constitution of the Church, and their decision to suspend a bishop. This led the Court to conclude this was a decision of a hierarchical nature, and they could not intervene, because "... the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice

is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them." [Id. at 724-725] The Michigan Supreme Court conducted a similar detailed analysis in *Borgman v. Bultema*, 213 Mich 684 (1921), also finding a hierarchical process.

Once this factual threshold is determined, a court may then determine, as a matter of law, whether it may exercise its own jurisdiction, or defer to the ecclesiastical decision of the Church.

Dlaikon Involved No Similar Analysis

In contrast to *Lamont*, *Dlaikan v Roodbeen*, 206 Mich App 591 (1994) seemed to conclude that it lacked subject matter jurisdiction, Id. at 592, and reversed on that basis. Id. at 594. In further contrast to the cases cited above, the court's two-judge majority opinion included no factual analysis of whether the decision at hand was hierarchical or congregational, or otherwise involved ecclesiastical questions. It instead focused on the type of services that were at issue, concluding without much discussion that "the pleadings demonstrate that plaintiffs' claims are so entangled in questions of religious doctrine or ecclesiastical polity that the civil courts lack jurisdiction to hear them." Id. at 593. Such analysis makes *Dlaikan* an outlier compared to cases such as *Lamont, Borgman*, 213 Mich 684; *Hillenbrand*, 312 Mich App 273; or *Bennison*, 121 Mich App 705.[2]

To be fair, as appellant concluded in her brief below, there is a severe dearth of authority throughout the U.S. on whether ecclesiastical abstention applies to services to third parties, such as the students in *Dlaikan* or Bettina Winkler. Nonetheless, its conclusion is difficult to support given the lack of factual development; and given the vigorous dissent, likely wrong.

[2] *Bennison*, Id. at 277-278, also termed this a subject matter jurisdiction question, although it did perform an extensive analysis of the congregational vs. hierarchical issue, and otherwise exhaustively and correctly surveyed the prevailing law on ecclesiastical abstention and its exceptions regarding disputes over church property.

The Court of Appeals Below Erred

This Court's second question is "whether the Court of Appeals correctly concluded that consideration of plaintiff's challenge to defendant's admission decision would have impermissibly entangled the trial court "in questions of religious doctrine or ecclesiastical polity," *Dlaikan,* 206 Mich App at 594." It bears noting what language the courts actually used.

Dlaikan wrote: "Here the pleadings demonstrate that plaintiffs' claims are so entangled in questions of religious doctrine or ecclesiastical polity that the civil courts lack jurisdiction to hear them." Id. at 594. While a court may be permitted some latitude in framing an issue, that frankly is not the test that any court has used – whether "claims are ... entangled."[3]

Dlaikan quotes *Maciejewski v. Breitenbeck,* 162 Mich App 410 (1987) for that source, but going to *Maciejewski* one finds a quote that a court "loses jurisdiction" where it "must stray into questions of religious doctrine or ecclesiastical polity", which is followed by a string cite of cases on ecclesiastical abstention. As noted above, the test is more accurately whether a determination of the legal issues may "be made without extensive inquiry by civil courts into religious law and polity", *Serbian E. Orthodox Diocese,* Id. at 708-709, or without "redetermin[ing] the correctness of an interpretation of canonical text or some decision relating to government of the religious polity." *Smith v Calvalry Christian Church,* Id. at 684. *Dlaikan* is void of references to any such evidence.

The Court of Appeals below misstated the test as well, focusing on the services provided rather than the facts of the decision at issue. The court wrote:

[3] *Lexis* finds two cases nationwide using similar language. Both quote *Dlaikan.* [*In re St. Thomas High Sch.*, 495 S.W.3d 500 (Tex. App 2016) and *Nykoriak v. Bilinski*, No. 319871, 2015 Mich App LEXIS 552 (Mar. 17, 2015).

"We hold that *Dlaikan* controls in the present case. Here, as in *Dlaikan*, plaintiff is suing a parochial school after she was denied admission. Thus, "the claim," whether it is premised on a breach of contract as in *Dlaikan* or disability discrimination as is the case here, "involves the provision of the very services (or as here refusal to provide these services) for which the organization enjoys First Amendment protection[.]" *Id.* at 593. Pursuant to *Dlaikan*, "[a] civil court should avoid foray into a 'property dispute' *regarding admission to a church's religious or education activities*[.]" *Id.* (emphasis added; citation omitted). [*Winkler v. Marist Fathers of Detroit*, No. 323511, 2015 Mich App LEXIS 2107, at *6-7 (Nov. 12, 2015)]

As noted above, there is no precedent for this standard, without a finding as to what the decision making process actually was – which is necessary to determine whether ecclesiastical abstention applies. The *Winkler* court compounded the error in its next section:

"Plaintiff, amicus, and the trial court take the position that this case is distinguishable from *Dlaikan* because plaintiff's claim involves disability discrimination. Further, plaintiff asserts that there was no religious justification for plaintiff's rejection. However, both arguments would require the courts to delve into the decision-making process of defendant, a religious institution. As *Dlaikan* explained, the factual basis for the denial is not an appropriate consideration by civil courts." *Winkler*, Id. at 7.

But this is precisely what a court must do to find whether ecclesiastical abstention applies. It must "delve into the decision-making process" to make that determination. Ecclesiastical abstention is not a blanket immunity principle for all decisions made by a religious institution; it must first be shown that there was a *hierarchical decision* involving *religious doctrine or polity* before the defense applies. Thus a court *must* be permitted to "delve" into that process.

Even to the extent *Dlaikan* may be relevant, in Bettina Winkler's case, there is nothing in the pleadings that would indicate a decision "entangled in religious doctrine or ecclesiastical polity." Ms. Winkler simply pled that she was denied admission to the high school, on information and belief the only middle school student so refused, because the defendant did not want to deal with her learning disability. Defendant has made a general denial, rather than claim that their decision was a hierarchical one or steeped in doctrine or polity.

This Court Should Overrule *Dlaikan*

The court's third question, in its order considering the application for leave, is "whether this Court should overrule *Dlaikan*, and if so, on what basis." Plaintiff-Appellant Bettina Winkler has explained above why *Dlaikan* misstates the prevailing law on ecclesiastical abstention, especially by its failure to conduct a factual analysis on the defendant's decision in that case to deny admission to the plaintiffs, to determine whether the decision was hierarchical or congregational, and its erroneous focus on the services to be provided to the students, rather than the decision made. If not overruled, its import will be to bar inquiry into potentially discriminatory admissions decisions by religious schools, where such inquiry is necessary to determine whether ecclesiastical abstention applies.

Summary and Conclusion

Ecclesiastical abstention is a doctrine that defers to the formal, hierarchical decision-making process of a religious institution regarding matters of religious doctrine or polity. There is nothing in the record in this case to indicate any such decision-making process, or that the Marist Fathers' decision to deny Bettina Winkler admission to its school had anything to do with ecclesiastical matters – in fact, all evidence suggests non-ecclesiastical, and potentially discriminatory reasons.

Because *Dlaikan v. Roodbeen* was wrongly decided, and the Court of Appeals relied on *Dlaikan*, that case should be overruled. It is difficult to find a path to restrict *Dlaikan* to its facts, or a more narrow application, when the record was not well developed in that case.

Plaintiff-Appellants seeks an opinion from this court that is more consistent with the history of the ecclesiastical abstention doctrine, that ultimately permits her to have her case adjudicated on the expected determination that the abstention doctrine does not apply on this record, and that essentially secular school admission decisions made by religious institutions may be examined under anti-discrimination statutes.

W H E R E F O R E Plaintiff-Appellant Bettina Winkler requests this honorable court grant her oral argument, grant her application for leave to appeal, and overturn the decision of the Court of Appeals dismissing her claim.

Respectfully submitted,
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/s/ Nicholas Roumel

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December 23, 2015

Certificate of Service

I certify that I served this document on January 31, 2017, upon all parties as listed in the caption above via email and via the court's ECF system.

NACHT & ROUMEL, P.C.

/s/ Nicholas Roumel